IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT DAYTON

JOHN DOE NO. 1, JANE DOE NO. 1, JOHN AND JANE DOE NO. 1, JOHN DOE NO. 2, JANE DOE NO. 2, JOHN DOE NO. 3, JOHN DOE NO. 3, JANE DOE NO. 4, JANE DOE NO. 4, JANE DOE NO. 5, JANE DOE NO. 5, JANE DOE NO. 6, JANE DOE NO. 7, JANE DOE NO. 7, JOHN DOE NO. 8, JANE DOE NO. 8, JOHN DOE NO. 9, Plaintiffs,	CASE NO. 3:22-CV-00337
-vs-	
BETHEL LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, LYDDA MANSFIELD, LORI SEBASTIAN, NATALIE DONAHUE, DANNY ELAM, JACOB KING, MATTHEW CHRISPIN, Defendants,	ORAL ARGUMENT
-vs-	
ANNE ROE, Intervenor Defendant.	COURTROOM 4

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE **MICHAEL J. NEWMAN,**
UNITED STATES DISTRICT JUDGE, PRESIDING
TUESDAY, MAY 9, 2023
DAYTON, OH

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*** *** *** ***

P-R-O-C-E-E-D-I-N-G-S 9:56 A.M.

COURTROOM DEPUTY MS. McDOWELL: All rise. This United States District Court for the Southern District of Ohio is now in session. The Honorable Michael J. Newman, United States District Judge, presiding. Please be seated.

THE COURT: Good morning, everyone. So I'll begin by apologizing. I understand we've had some technological issues this morning. The Court's been ready to start at 9:30. It's now almost ten. We're almost a half an hour late. I was waiting in our chambers ready to start at 9:30.

We went through the system yesterday, had no glitches whatsoever; but apparently today we're having some glitches, so I apologize. I've now actually called our Clerk of Courts, because I'm so upset, because we shouldn't be having issues like this.

So with all that in mind, Mr. Ashbrook, can we talk to you? Are there folks that you wish to have on-line this morning? I want to be sure that everyone, you and Lynnette and the other parties, wish to have here are able to be here, so I just want to talk to you about that before we get started.

MR. ASHBROOK: Yes, Your Honor. Thank you. I believe that we've discussed between the parties, and everybody is comfortable proceeding without the on-line access, and that we have been able to let anybody know who

is expecting to be on. So there's no issue from our end proceeding.

THE COURT: All right. And, Ms. Dinkler?

MS. DINKLER: No issue, Your Honor.

THE COURT: Okay. Any other party wishes to --

MR. CAREY: No objections from us.

THE COURT: Do you want to state who you are just so Julie --

MR. CAREY: David Carey. We represent the Defendant Intervenors, Your Honor.

THE COURT: All right. And Counsel?

MR. BARRY: Nicholas Barry. No.

THE COURT: All right. So I do apologize. We ran through it yesterday. There were no glitches. Apparently, for whatever reason, there's a glitch this morning. It happens. I appreciate your sensitivity in understanding, and my apologies also for running late. We try very hard to be on time.

So with that, who would like to begin first this morning? And we're under no time constraints, and I'm happy to hear from everyone.

MR. CAREY: Your Honor, the Defendant Intervenors will be beginning in a moment, but I'd like to inform the Court of the parties' agreement about the run of show, so to speak.

THE COURT: Please, please.

MR. CAREY: The parties have agreed -- and I'm sure Mr. Ashbrook will step in if I'm misstating anything -- the Defendant Intervenors and the Defendants will be going first, followed by an agreed ten-minute break, followed by the Plaintiffs, followed by an agreed ten-minute break, followed by rebuttal by the Defendants and Defendant Intervenors.

THE COURT: Works totally fine for me, and thank you. I appreciate your ability to work together, which doesn't happen in all the cases in front of me, and your kindness and your civility. It's all good. Thank you.

MR. CAREY: And we've also agreed that the cumulative total for each side is not to exceed half of the total available time. We do not agree in advance to any surrebuttals, to be taken as it comes.

THE COURT: I understand. Okay.

MR. CAREY: Thank you.

THE COURT: And the podium does go up and down, if you'd like it to. We can show you how to do that. There's just a little switch on the right-hand side.

MR. CAREY: Thank you, Your Honor.

THE COURT: And thank you for your patience this morning.

MR. CAREY: Once, again, good morning, Your

Honor --

THE COURT: Good morning.

MR. CAREY: -- David Carey of the ACLU of Ohio.

THE COURT: Nice to see you, Counsel, and thank you for being with us this morning.

MR. CAREY: Thank you, Your Honor. Representing Defendant Intervenor Anne Roe. I'll be primarily addressing the claims that are the subject of Anne Roe's Rule 12 Motion, which is Counts 2, 3, 4, and 5 of the Complaint.

But as an initial matter, I'd like to speak to the Court's question regarding whether the pending Rule 12 Motion should be resolved before the Preliminary Injunction, and we believe the answer to that is yes.

So just to clarify Anne Roe's position here as Intervenor, she has no position on the ultimate legal merits of the Plaintiffs' Open Meetings Act Claim, but she does oppose the grant of a Preliminary Injunction on the basis of the harm that would befall her, and she would be prejudiced if the Court were to enter an injunction before ruling on the Motions to Dismiss because even setting aside the Defendant's rule -- that the Defendants have filed a Rule 12 Motion on the OMA Claim itself, all of the Plaintiffs' Federal Claims are now subject to pending Motions to Dismiss; and should the Court grant those motions as to the Federal Claims, then the OMA Claim should be dismissed as

well.

It's true that 18 U.S.C. Section 1367 grants the Court discretion as to whether to exercise supplemental jurisdiction, but it is also well-established in Sixth Circuit that when all of the Federal Claims have been dismissed, that, quote, the balance of considerations usually will point to dismissing the State Law Claims, unquote. And that is from Musson Theatrical versus Federal Express, 89 F.3d 1244, pages 1254 to 55, Sixth Circuit 1996.

The Sixth Circuit has elsewhere described that as a strong presumption. That is, Pinney Dock Transport versus Penn Central, 196 F.3d 617, 620 to 21, Sixth Circuit 1999. And, finally, the Supreme Court has said the same. United Mine Workers of American versus Gibbs, 383 U.S. 715, 726, 1966.

And the reason for that rule is very clear. Federal Courts should refrain from unnecessarily deciding substantive issues of State law. And that is, we submit, what this Court would be doing if it were to rule on the Preliminary Injunction first.

In part, because the Preliminary Injunction presents a freestanding issue of State law. It doesn't turn on any Federal Constitutional questions. It's a discrete matter of State law.

Musson and Pinney -- the cases that I mentioned -- do allow for retaining jurisdiction, but that is when unusual circumstances exist, which in the case law boils down to judicial economy, convenience, and fairness.

So, for example, in Pinney, the cases had already been proceeding for several years, or in some cases the parties have completed discovery and fully briefed Summary Judgment, or the Plaintiff is voluntarily dismissing Federal Claims to engage in forum shopping.

None of that is the case here. There's been no discovery. We're at a preliminary stage of this matter. It would be simple enough to re-file this case in State Court.

Further, we submit that no -- there is no great emergency to resolve the Preliminary Injunction. The status quo at Bethel was in effect for nearly a year before the Plaintiffs brought this case.

That delay is why they had to rest on a statutory presumption of irreparable harm. Any claim of actual harm would have been undercut by the delay. So they can hardly claim a pressing emergency now.

Also, according to the School's calendar, Bethel's last day of school is May 25, which is less than three weeks away. I certainly don't mean to speak for the Court, but it does seem likely that by the time today's argument can be taken under advisement, and a ruling issued, that time

either will have passed, or nearly so, and the students will be into the summer break.

On top of all that, as the Court is aware, the Plaintiffs' OMA Claim is duplicative of a pending State Court action, which creates an elevated risk of conflicting rulings.

So we submit that regardless of the outcome of the School District's Rule 12 Motion on the OMA Claim itself, this Court should rule on the Rule 12 Motions first at minimum as to all Federal Claims before ruling on the Preliminary Injunction, so as to serve that strong policy and strong presumption of deferring to State Courts on State law.

So turning to the Rule 12 Motion. I'll start with Count 2, which is Title IX. The Plaintiffs are plainly intent on getting this Court to weigh in on an abstract question about how Title IX should be interpreted; but their claim is just that, it's an abstract question.

Under Lujan, they have the burden to demonstrate all three elements of Standing. They fail on all of them, for the reasons that we've explained, but maybe the most obvious problem they have is redressability.

They could win on this claim, and nothing would have to change. They could lose on this claim, and nothing would have to change.

That is the definition of an academic question and that should be the end of their claim -- dismissal for lack of subject matter jurisdiction.

Over the course of this case, the Plaintiffs have jumped between several Standing theories, and I would like to briefly recap why each of them fails.

First, they described the purpose and context of their Title IX Claim at the February 7 Preliminary Injunction Hearing around Pages 62 to 63 of the transcript.

Counsel stated that his clients disagree with the School District's understanding of Title IX, and described it as a contentious issue of public debate.

The Plaintiffs are seeking clarity and resolution on that issue in what they described as clear binding guidance, so that the School District can, quote, make decisions off of it, unquote.

As we've explained, all of that fundamentally misconstrues the role of courts. Courts resolve live cases and controversies. They do not preemptively advise other Government bodies about the meanings of laws for the purposes of guidance, whether binding or otherwise.

In fact, that is at the heart of what Article III Courts cannot and do not do -- issue advisory opinions.

So even if the School District had been wrong about Title IX -- which it was not, and I'll be discussing that in

a minute -- the Plaintiffs would need a cause of action brought under Title IX, not merely a question about it. They've brought no such claim.

Second, in their Standing briefing, the Plaintiffs argued that the School District is enforcing Title IX in a manner that violates their Constitutional Rights.

And the problem with that argument is that it doesn't describe a cause of action under Title IX. The Plaintiffs do have other claims that the School District has allegedly violated their Constitutional Rights by its actions, but they are not in a position to challenge Title IX itself because it's not being enforced against them.

They're not an entity that is subject to Title IX. They don't claim that anybody has brought or imminently will bring an enforcement action against them under Title IX.

Contrast that with the case that they cite, Steffel versus Thompson, where a Plaintiff challenged a criminal statute when he was under immediate threat of prosecution. There's no equivalent to that here.

Third, and also in their Standing briefing, the Plaintiffs argue that if the School District had acted differently than it did, Anne Roe might have sued the School District, or they claim that if they prevail on their Constitutional claims in this case, Anne may sue the School District some day in the future; and they contend that the

Court should adjudicate that now.

Neither one of those scenarios gets them closer to Standing. The first one is counterfactual; and, therefore, moot. The School District provided Anne with equal restroom access, so why would this Court need to rule on litigation that she never brought on a situation that never happened?

The other scenario involves multiple layers of speculation. The prospect of future litigation that may or may not happen does not constitute an imminent or certainly impending injury that would confer Standing.

And even further, any lawsuit would be brought against the School, not against the Plaintiffs. They have no basis to demand preemptive adjudication of any future lawsuit, much less one that is unripe and speculative. Even less, one that wouldn't be brought either by them or against them.

So that brings us to their opposition to Anne Roe's Rule 12 Motion. And here, again, they go back to the first theory. They concede repeatedly that they are seeking a ruling about whether Title IX, quote, permits, unquote, the School District to expel transgender students from communal restrooms matching their gender.

That is the framing of the Complaint. It matches what they said at the February 7 hearing, and it is not a basis for Standing.

Because, again, they're not saying that they're entitled to relief because of Title IX. They're saying that they're entitled to relief for other reasons under other laws, and that Title IX is not a defense.

The Supreme Court addressed that in the MedImmune case -- MedImmune versus Genentech. That litigants, quote, may not use a Declaratory Judgment Action to obtain piecemeal adjudication of defenses that would not finally and conclusively resolve the underlying controversy, unquote. That is the precise maneuver that the Plaintiffs are attempting here.

Now, at the last minute in this latest brief, the Plaintiffs seem at times to be trying to suggest that Title IX has been violated; but they never explain how their Title IX rights have been violated.

Even assuming that is what they mean to argue, that fails for a couple of reasons. First, it's completely inconsistent with the cause of action described in the Complaint.

Part of the reason we know that is that the Plaintiffs have not suggested anything of this like before. Their claim in the Complaint is about whether Title IX permits banning transgender students from restrooms matching their gender, not whether Title IX requires such a ban.

Nothing that has been pled anywhere -- second --

suggests that Plaintiffs are being treated differently on the basis of sex, nor do they ask for a Declaratory Judgment saying so.

All they've argued is that Title IX shouldn't be construed to encompass discrimination on the basis of gender identity. They don't point to any differential treatment based on sex.

So yet, again, what they're arguing is a disagreement about Title IX, not a claim that their Title IX rights have been violated. So they failed to allege any injury that would give rise to Standing.

Now, turning briefly to the merits of their Title IX Claim. Taken in a vacuum, the Plaintiffs' abstract question about the law is a relatively discrete one; and it's one that was necessarily answered by the Sixth Circuit in Dodds.

Their question is this: Does Title IX require public schools to refrain from excluding transgender students from the communal restrooms matching their gender identity?

The Sixth Circuit said, yes, it does require that. And Chief Judge Marbley said the same in the Highland School District case, and that tracks with settled principles of law in this circuit, not to mention the Supreme Court's decision in Bostock.

Discrimination on the basis of gender identity is necessarily a form of discrimination on the basis of sex. Title IX prohibits discrimination on the basis of sex.

We submit that this Court is not free to simply ignore the Sixth Circuit's ruling in Dodds as the Plaintiffs urge it to do.

In no small part because that ruling was correct, but the larger point is that this case does not reach that question.

The Plaintiffs have made no secret of their goal with this claim. They're not seeking resolution to a discrete ripe live controversy, which a Declaratory Judgment would not provide them anyway.

They're asking for a gratuitous preemptive opinion from a Federal Court that they can use as a bargaining chip against the School District in an ongoing political dispute. That is exactly what they explained in the February hearing in this matter.

Federal Courts do not -- and we submit should not -- allow themselves to be used in that manner. So we submit that it would be reversible error to do so here.

Moving forward to Count 3, the Parenting Right. This claim is very straightforwardly subject to dismissal on the face of the Complaint; and I say straightforwardly because there is a well-developed and robust body of

jurisprudence that provides us with a clear bright line, and these claims fall on the wrong side of it.

The Sixth Circuit explained that line in Blau versus Fort Thomas Public School District. Parents have a fundamental right to decide whether to send their child to a public school. They do not have a right to reach into that school and dictate its operations or its policies or what it teaches.

That principle extends to curricular content, to extracurricular activities, school discipline, hiring practices, dress code, and, yes, restroom accommodations.

Whatever other legal rights may be implicated by various schools' practices and policies, whether those rights are Federal or State, statutory or Constitutional, the fundamental Parenting Right of the United States Constitution simply does not grant a right to control public schools the way that Plaintiffs are asserting here.

Another way to think of this is that the Parenting Right grants protection from State intrusion. The Supreme Court put it that way in Troxel versus Granville. That the right does not allow the State to, quote, inject itself into the private realm of the family, unquote.

That is the core guiding principle and core distinction for this area of law, and we've cited cases to that effect from the First, Second, Fourth, Fifth, Sixth,

Seventh, Ninth, Tenth, and Eleventh Circuit, plus the Supreme Court, and that basic principle dispenses with all of Count 3 here.

The Parenting Right gives no basis to control a school's restroom arrangements. It gives no power to manage the school's curriculum, and it gives no authority to force the school to respond to what are essentially interrogatories and hypothetical questions.

The Plaintiffs attempt to draw a couple of distinctions here, but they don't hold up.

First, they point out that in Blau the Sixth Circuit wrote that the right plainly extends to the public school setting.

That is, of course, true, and we don't maintain otherwise; but the Plaintiffs' brief takes that partial sentence badly out of context to suggest that it somehow implies that parents do get to control the public school setting in some circumstances.

But, in fact, the rest of that sentence, the rest of that paragraph, the rest of Blau, and the rest of this body of law make it clear that the right may extend to the public school setting, but that doesn't mean it gives the parents the right to control the school. Blau quite literally says the opposite of that in the very next sentence.

We've repeatedly pointed in our briefing to Arnold, an Eleventh Circuit decision, because it shows the clear demarcation here.

Parents don't have the right to demand information or to compel the school to act in a certain way, but in Arnold, it was a violation of the Parenting Right for school personnel to coerce students not to tell their parents about a pregnancy.

No one is suggesting that school officials were exempt from following the law merely because they made those coercive statements on school grounds.

The operative question in Arnold was the same as the operative question here: Did public officials inject themselves into the private realm of the family?

The right applies in the public school context, in the public school setting, which is essentially just to say that the school is a Government entity subject to the Constitution. That's all the Sixth Circuit was saying with that one partial sentence in Blau.

Second, the Plaintiffs argue because their Parenting Right is intertwined with their religious beliefs, and because they brought a Free Exercise Claim, the Parenting Rights Claim is boosted such that strict scrutiny automatically applies.

As we've pointed out in our briefing, they are not

the first litigants to make this argument. It's the so-called Hybrid Rights Theory.

It's drawn from some dicta in Employment Division versus Smith, and in an aggressive misreading of Wisconsin versus Yoder.

And the Sixth Circuit could not be clearer about rejecting it. They rejected it in 1993, Kissinger; 2001, Watchtower; 2002, Prater; and again in 2020, Pleasant View Baptist Church; and it was right to do so, because, frankly, it makes no sense to suggest that alleging two different kinds of Constitutional violations somehow invokes stronger protections than either one on its own.

And as we've noted in our Reply Brief, many of the cases specifically rejecting a Parental Right to control school operations also involved religious objections, but that didn't change the fundamental scope and nature of the Parenting Right.

This is a well-developed area of law, and claims of this general nature are not especially uncommon; but the Plaintiffs have cited no precedent for any of the particular parental powers that they're claiming here.

Instead, they're resting on an implausible reading of Blau, a rejected interpretation of Yoder and Smith, and then inflating their claim by comparing the Bethel Local Schools to Spartan military trainings and medieval

thiefdoms.

But at the end of the day, this is a very simple claim. The Plaintiff parents simply don't agree with the School's curriculum or its restroom accommodations.

That is not and cannot be a basis for parents to commandeer school operations. Otherwise, schools would simply collapse from all of the conflicting parental demands. So Count 3 should be dismissed.

Moving on to Count 4, Equal Protection. I'll start with a simple point that provides a clear basis for dismissal.

The Plaintiffs have not alleged discriminatory intent, and that on its own is fatal, leaving aside everything else. That has been the law ever since Washington versus Davis.

A showing of discriminatory purpose is required. And that is purpose, not merely awareness, that disparate impact may occur.

Here, not only did they not allege in the Complaint that the School District intended to treat religious students differently or was motivated to that effect, they've actually alleged in the Complaint what the School's motivation was, and it wasn't that.

They've alleged that the School District was doing this in order to protect transgender students' rights. Its

intent was specifically not to discriminate.

That really could be the end of the analysis, but it's also worth discussing the fundamental structural flaws of this claim.

This Equal Protection Claim is trying to put a square peg in a round hole, and the first obvious indicator of that is that the Plaintiffs are making an Equal Protection Claim about restroom access when they have the same restroom access as everyone else.

And that is critical. The Plaintiffs don't actually allege that they are being subjected to some kind of different conditions from other students.

Instead, what they're claiming is, in essence, that they didn't get what they wanted. They allege that transgender students got what they wanted -- namely, equal access to restrooms -- and that since the Plaintiffs are religious and also protected from discrimination on the basis of a protected characteristic, they should also get their preferred outcome; even, though, in this case, their preferred outcome is nothing more than removing the equal restroom access that had been given to transgender students. That's simply not how Equal Protection works.

They haven't identified a similarly-situated comparator class. They haven't shown differential treatment.

As a comparator class, they've attempted to point to transgender students, but the only thing that they share with that group is having some protective characteristic. That doesn't make them comparable in every relevant respect.

And the Plaintiffs' only claim of differential treatment is that Anne Roe was afforded access to a restroom matching her gender, and that the Plaintiffs aren't being allowed to have that access taken away.

That is not describing unequal treatment. It's describing the School providing equal treatment to transgender students in a way the Plaintiffs don't like.

They're not alleging that Anne gets to use a restroom while they're denied access to it, and they're not arguing that the School treats religious students differently than non-religious students on the basis of their religion.

What they're doing is trying to equate, on the one hand, transgender student's right to be free of unequal treatment, with, on the other hand, Plaintiffs' own desire to compel unequal treatment, which they've couched rhetorically as an aspect of their identity. That is a false equivalence.

Nothing about Equal Protection means that affording equal treatment to one group automatically means that another group may come along and demand the removal of that

equality as a sort of reciprocity.

So, again, the Plaintiffs are not seeking equal treatment. They have equal treatment. What they want is for it to be denied to others.

We've pointed to Jones versus Boulder Valley School District, which is a District of Colorado case, simply because it's so strikingly similar to the Plaintiffs' framing here.

In that case, a group of parents sued a public school over its transgender tolerance curriculum to which they had objections.

They argued that as religious parents, they were being treated unequally from non-religious parents because their preferences were not being adopted and that the curriculum was a concern for their religion.

And the Court rejected that claim, because just like here, there were no allocation of unequal treatment. Everyone was having to take the same program. No one was exempt from it.

That is why Plaintiffs' Equal Protection Claim fails under both Federal and State Law. The Plaintiffs are not being treated differently on the basis of their religion. They're subject to the same restroom arrangement as everyone else, and they're treated no differently under it.

The only difference is that they object to it; and for Equal Protection purposes, that on its own is not a difference. And, again, they've alleged no discriminatory purpose, so this claim should be dismissed.

That brings me to Count 5, Free Exercise. Under Employment Division versus Smith, the school's restroom arrangements are subject to rational basis review under the U.S. Constitution essentially for the same reasons that I just discussed for Equal Protection.

The Plaintiffs are not being subjected to unequal treatment on the basis of religion. They're subject to the same rules as everyone else, and those rules are not specifically directed at religious practice. They do not discriminate on their face, and religious exercise is not their object.

Under Smith, and Kennedy versus Bremerton School District, this is a neutral and generally applicable policy; but even if it wasn't neutral, it still doesn't impose a substantial burden on the Plaintiffs' religious exercise, which would be necessary for their First Amendment Claim; nor does it have a coercive effect, which they would need to show to state a claim under Article 1, Section 7 of the Ohio Constitution.

Quite simply, no one is compelling them to do or not do anything in particular. So, for example, they're not

being compelled to adopt any beliefs or recite any creed that is contrary to their faith.

They're not being compelled to refrain from any religious practice, such as wearing a garment or saying a private prayer.

They're not being compelled to engage in any act their religion forbids, such as an enforced prayer or eating food that is forbidden.

Instead, what is happening is that the Plaintiffs are not being permitted to compel the behavior of others by way of School policy.

They're not being permitted to control where others are allowed to be. And, here, the School has even gone so far as to provide alternative accommodations.

The Plaintiffs concede in the Complaint that they are permitted to use single-occupancy restrooms, and they do not claim that those restrooms violate any religious preference.

They argue in their briefing that those restrooms wouldn't accommodate a population of 400; but this is not a class action.

The status quo was in place for nearly a year before they filed this case, but they have not alleged any inability to use the restrooms themselves. They don't even allege that they tried.

And it is rather telling -- as noted in Anne Roe's Reply Brief -- that the Plaintiffs are not actually asking for a religious accommodation here.

They are not asking for a restroom that fits their religious preferences. They can't, because they already have one.

They are not asking for more single-occupancy restrooms or better single-occupancy restrooms. They're not asking for stall doors that afford them greater privacy.

What they're asking for is for someone else to be excluded altogether -- not because the status quo is coercive on the Plaintiffs or substantially burdens their rights. It's not, and it doesn't -- but because it is the Plaintiffs' preference that their environment conform to their religion. That does not suffice for Free Exercise Claim.

And this is a common motif across several of the Plaintiffs' claims, so it's worth emphasizing here. It is not an invasion of one person's Constitutional Rights when the Government does not act on their behalf to dictate the actions of their classmates or their children's classmates in the name of religion.

It is Plaintiffs' requested relief that would be coercive by expelling Anne Roe and other transgender students from the restroom on the basis of their classmates'

religious beliefs.

And that dispenses with the Federal and State Free Exercise Claims with one addendum. In their Opposition Brief, the Plaintiffs argue for the first time that the School District is motivated by animus toward religion.

These allegations do not appear in the Complaint. And for the reasons discussed in our Reply, this case is miles away from the one case that the Plaintiffs cite on this point, Meriwether versus Hartop.

There are no allegations of overtly hostile comments here as there were in Meriwether. The School District has not danced around different justifications for its actions.

It hasn't repeatedly flip-flopped or obfuscated about what its non-discrimination policy even requires. Everything is quite clear. The Plaintiffs simply disagree with it.

The Plaintiffs also discuss in this section an investigation of a supposed incident involving Anne Roe. And setting aside everything else about that, nothing about it has been pled, which renders it wholly irrelevant to a Rule 12 Motion.

The bottom line, yet, again, is that the mere fact that the School District made a decision that the Plaintiffs find offensive does not indicate discrimination or animus.

For all those reasons, rational basis review applies here. The School District easily clears rational basis, and the Plaintiffs don't attempt to argue that it doesn't.

But even if strict scrutiny somehow did apply here, the School's restroom arrangement survives. It arises out of two tightly inter-related compelling interests.

First, non-discrimination. The Plaintiffs allege that the School District was complying with its understanding of Title IX. The purpose of which is non-discrimination. Combatting discrimination, according to the Supreme Court, is a compelling interest of the highest order.

Second, and related, student health and safety. That is tightly related to non-discrimination. There is a reason that non-discrimination is such a powerful compelling interest, especially in the context of schools; and that's in part because it serves in turn student health and safety.

At Paragraphs 48 and 49 of the Complaint, the Plaintiffs appear to concede that part of the impetuous here was protecting students from the perceived emotional harm that would result from denying equal restroom access.

And the School's action was as narrowly tailored to those interests as it was possible to be. Anything else would have failed to alleviate the discrimination that Anne

Roe was suffering.

And according to the School FAQ document, which is described in the Complaint and attached to the School's Answer, the School extended single-occupancy restroom access to anyone who wanted additional privacy. The Plaintiffs have simply elected not to use that option.

In their response to Anne Roe's Rule 12 Motion, the Plaintiffs argue that a more narrowly tailored solution would have eliminated bullying altogether, which they apparently believe is not only possible at all in high school, but achievable through what they call civic education. Frankly, that's just lacking credibility.

Yes, it would be wonderful if students would all be kinder to each other. It would be wonderful if students didn't berate my client on her way to the restroom, as she's recounted in her declaration testimony.

It would be wonderful if people didn't ask her invasive questions about her body, or declare as she passes that we should kill all transgenders, or leave scissors sitting upright on her school chair, or spray her with disinfectant spray; but suffice it to say, that doesn't seem likely to be our reality any time soon.

School administration could not just stick its head in the sand -- as the Plaintiffs suggest it should have done -- so it took the only action available to it in the

interest of serving all of its students.

It's not the fault of the School that the Plaintiffs are dissatisfied with that. I'll stop there until rebuttal unless the Court has questions.

THE COURT: No. Thank you, Counselor.

MR. CAREY: Thank you.

THE COURT: Good morning, Ms. Dinkler.

MS. DINKLER: Good morning, Your Honor.

THE COURT: Just double-checking in an abundance of caution, you're able to hear everything okay? No -- no accommodation issues?

MS. DINKLER: Yes. Thank you very much.

THE COURT: My pleasure. My pleasure.

MS. DINKLER: Time cures all. May it please this Honorable Court, Your Honor, Opposing Counsel (Indicating), Counsel for Intervenor Defendant (Indicating), my name is Lynnette Dinkler, and I represent the Board of Education, and the individually-named Defendants in official capacity only.

As in the briefing, the Board of Education Defendants join in Anne Roe's briefing and Oral Argument presented here this morning. Those topics will not be re-addressed, but, rather, submitted to -- enjoined in.

To address the additional issues that remain, and to supplement a few, I start with Count 6, which is the

pupil -- or Protection of Pupil Rights Amendment Claim that the Plaintiffs allege.

To date, this Court has been presented with no law to state that that is a claim that can be prosecuted by the Plaintiffs here.

The Plaintiffs have not explained why this Court should not apply to dismiss this claim. The Supreme Court's decision in Lexmark International versus Static Control Components, Inc., a 2014 decision.

Instead, the Plaintiffs have stated and stated again that this Court should apply a 1997, and a 2002 decision from the Supreme Court, Blessing versus Freestone, and Gonzaga University versus Doe, respectively.

There's no basis for using old law, when the Supreme Court has made its position clear. Furthermore, to date, the Plaintiffs have not explained where a private cause of action springs from the PPRA when the Enforcement Clause in that Federal Act found in 20 U.S.C. 1232h, Subsection E, makes clear that there is no private cause of action. In the absence of law, there is no Standing or Merit Claim under the PPRA to be asserted here.

Turning to Count 1, the OMA Claim. It is, in fact, distinct and separate from all other claims brought in this lawsuit; and as fully briefed by the parties, should be decided by the State Court. That proceeding is in

discovery, and abstention is appropriate.

The Plaintiffs here on the Merits with regard to that claim -- should the Court choose to visit it -- do not apply a Federal pleading standard. The elements are straightforward.

It is a statutory claim, and those independent elements have not been pled in the Complaint. Because no Federal law implicates the OMA Claim -- which is freestanding -- the State Court should decide it and/or this Court should dismiss it.

With regard to the issue of Standing in general, the Plaintiffs have suggested that where one Plaintiff demonstrates Standing, the Court should no longer look at Standing, and all Plaintiffs should be assumed to demonstrate Standing under Article III case in controversy.

The case law pointed to by Plaintiffs on this issue deal with a class action -- which is not at issue here -- and deal with the issue of Associational Standing -- which is not at issue here.

There are no rights of third persons at issue in the Complaint. An issue that Warth versus Seldin took up at 422 U.S. 499, which is the pinpoint cite.

Absent any law to suggest otherwise, each claim -- Federal and State -- must be reviewed for Standing with regard to the Plaintiffs.

And as pointed out in the briefing, the Plaintiffs fit into three different packages: The Muslim students and then, slash, their parents, which is a subsection; the Christian students, slash, the subsection, and their parents; and then the parent of the non-religious background asserting a general privacy claim.

In the Plaintiffs' Reply to Standing, Document 67, PageID 1477, the Plaintiffs cite and ask the Court to apply a Fourth Circuit 2020 decision by the name of Grimm versus Gloucester City School Board, 972 F.3d 586, with a pinpoint of 618.

They cite it for the proposition that emotional and dignitary harm is cognizable. The issue of harm has been fully briefed, and I don't raise the case for that issue but to discuss some very important points, given that Plaintiffs have acknowledged the authority in its application here made by Circuit Judge Floyd in that opinion.

In that case, Grimm, a high school male transgender student, files suit against the Board of Education because the Board of Education denied him access to communal restroom based upon his identity.

And the Fourth Circuit rejected the Board's policy as unconstitutional under Equal Protection and in violation of Title IX.

The Court addressed this issue as described by

Judge Floyd. At the heart of this appeal is whether Equal Protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender. We join a growing consensus of courts in holding that the answer is resoundingly yes.

Acknowledging that this is not squared with the allegations here, because we have objectors filing suit and Anne Roe as an Intervenor Defendant, the points made in this decision demonstrate as a matter of law that there is no animus and can be no animus of discriminatory intent associated with the Board of Education's accommodation of Anne Roe's request for access to communal restrooms. The Complaint allegations state that, and the law states this.

The -- the Court in that case demonstrates that a policy regarding the use of sex-separated restrooms in a discriminatory manner based upon a student's sex will violate the law, and it looks first at what is the intimate space at page 613, 614.

The Court citing authority and various sources in the record writes: No one questions that students have a privacy interest in their body when they go to the bathroom, but the Board ignores the reality of how a transgender child uses the bathroom by entering a stall and closing the door.

Cites Whittaker and Adams for the proposition, when

he goes into a restroom, the transgender student enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves.

In that case, before the filing of the suit, Grimm used the boys' restroom for seven weeks without incident. Here, Anne Roe used the restroom almost a year before suit was filed.

In the hearing the Court conducted on the Preliminary Injunction proceeding, an analogy was made by the Board of Education Defendants that using the restrooms at Bethel -- which Plaintiffs concede are separated by stalls -- it's no different when someone walks out of the stall that they wash their hands just like they would in a chemistry lab; and that, there is no associated privacy doing that, to create the basis for a Constitutional violation, or a violation of Title IX.

At page 612 in the Grimm decision, the Court writes: Transgender people frequently experience harassment in schools; and assign that, 78 percent physical assault in places such as schools occurs to the tune of 35 percent. The Court notes that the 2009 Congress expanded hate crimes to include based upon gender identity.

At 613, the opinion states, transgender people constitute a minority lacking in political power.

At 615 -- very similar to what the Complaint and

Answer set forth -- the Court notes there that, emails from apparently concerned community members and statements made in two heated board meetings, which were filled with vitriolic, off-the-cuff comments referring to Grimm as a freak, occurred.

Similar to the fact pattern here as alleged in the Complaint and demonstrated by the public record -- which the Court can take judicial notice of -- in Grimm, parents threatened to vote off board members if they allowed Grimm to continue to use the boys' restroom; and, here, three Bethel Board of Education members have been sued in a removal process in State Court.

At 620, the Court observes, students are, quote, pretty savvy and comfortable, end quote. Can, quote, understand and empathize with someone who just wants to use the bathroom, end quote.

The Court goes on to state that, it is the adults who struggle with it more.

The judge finishes the opinion with profound statement by saying, the proudest moments of the Federal Judiciary have been when we affirm the burgeoning values of our bright youth rather than preserve the prejudices of the past.

The Court cites and asks and -- and compares Dred Scott versus Sanford, which held that the U.S. Constitution

did not extend American citizenship to people of black, African descent; and, thus, they could not enjoy the rights and privileges of the Constitution conferred upon the American citizens, decided in 1857.

In Bowers versus Hardwick, decided in 1986, which held, the Fourteenth Amendment does not prevent a State from criminalizing private sexual conduct involving same-sex couples.

With Brown versus Board of Education, decided in 1955, where the justices unanimously ruled that, racial segregation of children in public schools was unconstitutional.

And further compared the Obergefell versus Hodges' decision of 2015, Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects and that analysis applies to same-sex couples in the manner as it does to opposite-sex couples.

The judge continues with -- after those citations -- saying, how shallow a promise of Equal Protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community. It is time to move forward. The District Court's judgment is affirmed.

The Supreme Court denied a writ of cert on June 28,

2021, of that Fourth Circuit decision. Roberts, Breyer, Sotomayer, Kagan, Gorsuch, Kavanaugh, and Barrett all voted to deny cert.

Judge Watson relies upon Grimm in a 2020, Ray versus McCloud, 507 F. Supp. 3d. 925, pinpoint 936 through 939. The plain text of Title IX should not be overlooked here and is not addressed by the Plaintiffs.

42 U.S.C. Section 18116, Subsection A, states that, Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681, et seq., prohibits discrimination on the basis of sex in any education program or activity receiving Federal funding assistance.

And it continues on to state that, this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of that organization.

Here, all the parties agree that the Defendant is a public school created by Ohio State statute. It is not a private religious school that can seek abstention from Title IX, which is understandable.

This section of Title IX demonstrates why the Plaintiffs do not create a comparable class for purposes of Equal Protection.

This section also demonstrates why a Free Exercise

Clause Claim cannot stand here as a matter of law, and why Standing for both fail to exist.

The argument that Plaintiffs have raised in briefing of the 400-member Muslim community, let it be known -- as I think that it has from the beginning through the arguments, hopefully through the briefing -- that the Bethel Local Schools is a rich melting pot, and it benefits from having all of these students and all of their families in attendance; and it seeks -- with the financial resources that it has -- to best serve and educate all of them with a free and public education.

No action -- as the Complaint demonstrates -- taken by the Board of Education was done with any intent to act contrary to any protected right of any Plaintiff.

Enforcing Title IX in good faith to accommodate a request -- which the Plaintiffs have no right to weigh in on and still have not addressed the privacy concerns that limit their ability to weigh in on such request -- similarly, if any of the Plaintiffs made a request for accommodation, neither Anne Roe (Indicating), nor any other member of the student body or public would be permitted to weigh in on such a request. They have failed to address that issue because they can't.

It is because the School Board acted with no discriminatory intent -- only with an intent to follow the

law.

The new argument touched briefly upon by Anne Roe's Counsel regarding the Board of Education's now supposed duty to eliminate bullying -- which is not pled in the Complaint -- demonstrates why there is no Standing and no Merit Claim here pled in the Complaint.

A Lexis or Westlaw search just in Federal Courts with regard to bullying, Title IX will pull up thousands of cases, because, unfortunately, thousands of them are filed; and, unfortunately, many of them involve fact patterns involving students who have either attempted or have claimed their own lives.

School Boards of Education and teachers are immunized under Ohio Revised Code 2744 for things as simple as school fights where one student loses a temper, punches another. Why? Because we cannot control the acts of third parties. "We" meaning the Board of Education and its employees and its agents.

On one hand, the Plaintiffs are complaining that people within the School are talking about the subject of transgender students, and that they should not be doing that.

On the other hand, they're now saying that the Board of Education has failed because they have not given civic instruction on the topic of transgender students.

These oppositional positions demonstrate why the Complaint fails to make a claim. Thank you.

THE COURT: Thank you, Ms. Dinkler. We taking a break now, or are we hearing from Mr. Ashbrook?

MR. ASHBROOK: If we can, let's take a quick ten-minute break, so I can use the restroom.

THE COURT: We stand in recess. Thank you so much.

COURTROOM DEPUTY MS. McDOWELL: All rise. This Court is now in recess.

(Court was in recess at 10:50 a.m. and resumed at 11:09 a.m.)

THE COURT: Please be seated. Court's back in session. Okay. Mr. Ashbrook, whenever you're ready.

MR. ASHBROOK: Thank you, Judge Newman. Your Honor, Joseph Ashbrook for the Plaintiffs, and may it please the Court.

Roe and Defendants largely argue against the case they wish this was rather than the case that the Plaintiffs brought.

Biological sex -- indifference between the biological sexes is a distinction that has been recognized throughout the history of the nation and maybe potentially all of human history.

Title IX is a statute. Relates to specifically biological sex. That's the meaning of the word that was

used when Congress put it in the statute. And so this dispute is not about Roe having equal access. It's not even about Roe at all.

We -- Roe intervened in this case; but this is between the Plaintiffs and the School District. This case is about the Plaintiffs enforcing the Plaintiffs' right, and we're going to get to that in a minute; but Roe is not -- Roe is not fundamentally by the School being treated equally. Roe is being treated special; and our clients, the Plaintiffs, are being treated unequally by the School, and that's the problem, and that's what this case is all about.

The briefing on these issues is robust, and the question for today is just whether the Plaintiffs have stated claims upon which relief can be granted. The answer to that question is, yes, as the Plaintiffs have stated claims under the straightforward application of the law.

Before I get to the other claims, a quick word on the Open Meetings Act. We believe our analysis on this issue is correct on the law. Today is now the sixth opportunity Defendants have had to argue the issue, and they still didn't offer any substance to refute that analysis.

In the instant motion, Defendants argue that we didn't plead necessary elements for the OMA Claim, but do

not explain what those elements are or offer any law to support the argument.

We pointed -- we pointed that out in our Response Brief; and even with the Reply and now in Oral Argument, the Defendants have not provided any support for that argument or any law for any elements that we are missing.

In the end, the private right of action in the OMA only requires a violation or threatened violation of the statute; and as we briefed, our Complaint demonstrated that Defendants' violation of the statute was not only plausible, but virtually certain, and the proceedings thus far have proven that to be true.

In the end, Defendants violated both the letter and the spirit of the law by acting on a contentious issue in secret, and the Plaintiffs are empowered by the OMA to restore the legal status quo, enforce invalidation of Defendants' new rule -- separating communal restrooms by gender identity rather than by biological sex -- and to require that any further action on that issue, if Defendants desire, be taken in open meeting of the public body.

Now, a few preparatory remarks before getting into the other claims. As required by the Rules of Civil Procedure, the Plaintiffs provided short -- a short and plain statement of their claims showing their entitlement to

relief. The Plaintiffs have civil rights too, and that is what this case is about.

Defendants are not treating the Plaintiffs evenhandedly. They're not treating religion neutrally, and they are discriminating against Plaintiffs by denying them an educational benefit that they are providing to others.

Ultimately, Your Honor, Defendants and Roe cannot grapple with the benefit aspect of this dispute, and that motif, as Counsel adequately said -- this is a corollary to that point -- works its way through all of the claims.

There is no dispute that communal restrooms are an educational benefit. A point made multiple times in the Complaint. For example, Paragraphs 91, 121, 123, and 124.

I also don't believe there's any dispute that biologically sex-separated intimate facilities are a long-standing benefit deeply rooted in our nation's history and tradition, and we specifically pled that in Paragraph 113 of the Complaint.

And that benefit -- that benefit, biologically sex-separated intimate facilities, is expressly provided for in Title IX, which we explained in Paragraph 42 of the Complaint and Section 1686 of Title IX.

Therefore, intimate facilities separated by

biological sex that our Plaintiffs have taken advantage of and came to expect are a long-standing, well-established benefit deeply rooted in our nation's history and tradition, and that benefit is also long-standing, well-established educational benefit at Bethel Schools, which we've explained at length, and we stated in Paragraph 41 of the Complaint.

But now Defendants have taken that benefit away from the Plaintiffs, and they are now denying Plaintiffs that benefit because they claim they are enforcing Title IX, which they claim requires them to do so.

Now, Roe's Motion to Dismiss and Judgment on the Pleadings on this issue -- the Title IX issue -- is divided into Standing and their Merits argument.

I'm going to deal with the -- and the Merits going to the idea that schools can provide -- that -- whether schools can provide the benefit of sex-segregated intimate facilities.

I'm going to deal with Standing first. In their Standing Section -- in Roe's Standing Section, Roe maintains that the issue here is hypothetical, and then adds an argument that Plaintiffs lack Standing to argue the Title IX issue because they don't have a Title IX Claim, and I'll address both of those parts.

The issue is absolutely not hypothetical.

Defendants have admitted they're enforcing Title IX, and in enforcing Title IX, they took away Plaintiffs' long-standing benefit, have given it to Roe, and then -- and then refused to give the same benefit to Plaintiffs, and that Defendants -- therefore, Defendants are enforced -- and which is violating our Constitution -- Plaintiffs' Constitutional Rights.

The Defendants are, therefore, enforcing Title IX against the Plaintiffs to the Plaintiffs' injury, and that enforcement of the law is creating Plaintiffs' actual injury and real interest in dispute.

There's nothing hypothetical about that, nor is there anything hypothetical about resolving the issue once and for all between all of the parties, which is the exact -- which is the reason Roe said Roe wanted to intervene in the Complaint -- in the dispute to begin with.

Now, as a way of underscoring why this issue is not hypothetical, to help you understand, I want you to consider -- Your Honor, I want you to consider Roe's case of Kennedy versus Bremerton School District.

What that case is going to stand for in the law 20, 30, 40 years from now is that's going to be the Supreme Court's citation that the Lemon test and Establishment Clause Jurisprudence is officially -- is officially defunct.

That will be the citation, and Justice Gorsuch gave significant discussion and elaboration on the Establishment Clause in that opinion.

Establishment Clause wasn't claimed -- wasn't -- wasn't a claim in the case. Let me -- let me give you some of his quotes in explaining what happened with the Government.

He basically said, the Government here has put itself in its own predicament by saying, we have to enforce the Establishment Clause (Indicating); and, therefore, we have to violate the Free Exercise Rights.

This case is about the football coach where the school denied the football coach's civil rights to exercise private prayer.

And they did it because they said we can't violate the Establishment Clause; and Gorsuch said, you guys created a false problem, and then he reached the Establishment Clause issue.

He says -- and I'm going to quote this -- the District effectively created its own vice between the Establishment Clause on the one side and the Free Speech and Free Exercise Clauses on the other, placed itself in the middle, and then chose its preferred way out of its self-imposed trap.

In truth, there is no conflict between the

Constitutional commands before us. There's only a mere shadow of a conflict -- a false choice premised on a misconstruction of the Establishment Clause.

No one -- when they cite -- no one is going to argue that Kennedy is an advisory opinion when they cite it for the proposition that Lemon is now no longer good law in the United States of America.

That is posturally and procedurally almost identical to what is going on in this case before us. The School District has a -- a direction that it desires to go in. It has -- creates a false conflict between Title IX that they're misapplying, and the rights of the -- the First Amendment rights of the religious Plaintiffs in this case, which in Document 20 -- when they did their briefing opposing the PI and for the first Oral Argument on the 7th of February -- is how Counsel for the Defendants began the dispute.

The rights of religious claimants and transgender students under statutes like Title IX are still to be worked out in Federal Court. There's the problem.

All of the First Amendment jurisprudence -- and we're going to talk about it -- just applying the standard -- just applying the law is why we have a claim here -- that was all well-established in the law; but they put themselves in the middle of a false problem and chose

their way out of it.

To borrow Justice Gorsuch's language here, there's only a mere shad--, -- but adapting it -- there's only a mere shadow of a conflict. A false choice premised on a misconstruction of Title IX.

And in Kennedy, the school even had a Q&A like the FAQs here, where the school said it's the Establishment Clause that we have to abide by. They were enforcing the Establishment Clause. Just like in their FAQs, the School District here made clear that we're enforcing Title IX. We have to enforce Title IX.

Ultimately, Standing is about a Plaintiff having a real interest in the litigation and suffering cognizable harms.

The School is actively enforcing Title IX to Plaintiffs' injury, and it admitted that it's doing so.

Consistent with Kennedy, there's nothing hypothetical about the issue in this case, nor is the Court's analysis on the issue advisory.

Plaintiffs -- the second aspect of what Counsel raised in Defendants' briefing was that the Plaintiffs also don't have a claim under Title IX.

And, again, this was in the -- this was in the Standing subsection of Roe's briefing -- excuse me -- Roe's briefing.

They argue that Plaintiffs don't have Standing under Title IX, including because they don't have a claim under Title IX; but Plaintiffs absolutely have a claim under Title IX based on the Defendants' conception of the law.

Defendants are wrong on the law; but even under their own conception, they're discriminating against the Plaintiffs, and that's unavoidable. We said that in Paragraph 92 of the Complaint.

Under their conception of the law for Title IX, in addition to biological sex (Indicating) -- which is what the statute specifically provides for -- Defendants are adding gender identity and sexual orientation to the concept of sex.

To make an analogy to property law where the academic argument used to be, well, property law is really a bundle of sticks.

The School District is treating sex in Title IX as a bundle of sticks, and then what they're doing is that they are elevating one of the sticks -- gender identity -- over the others, including biological sex, on the basis of sex, and they can't favor one of those over the other aspects of the bundle without discriminating on the basis of sex.

And the only safe harbor that is provided in Title

IX for discrimination on the basis of sex -- discrimination just meaning you're treating somebody worse than somebody else -- discrimination -- the only safe harbor provided for discrimination on the basis of sex in Title IX is Section 1686, which provides for biologically sex-separated intimate facilities. Living facilities is the term, but it's used to encompass intimate facilities as well.

So, in short, Plaintiffs have Standing for their Title IX Claim because Defendants are enforcing the statute against them to their injury.

The Court's resolution of the issue is not advisory consistent with Kennedy; and contrary to Roe's argument in the instant motion, Defendants are absolutely discriminating against Plaintiffs on the basis of sex.

Okay. So from Roe's brief, that's Standing. Now the Merits.

In Plaintiffs' brief we laid out the statutory analysis for why Title IX expressly permits and does not preclude schools from providing the benefit of communal intimate facilities separated by biological sex. Dodds doesn't change that.

In their briefing, Plaintiffs' provided recent -- the recent Williamson County opinion from the Middle District of Tennessee, which rejected Roe's position on this issue -- not just with Dodds, but the entirety of the

issue.

Roe does not address that authority in Roe's Reply Brief. Instead, Roe provides a case from the Eastern District of Tennessee; and in that case, in Footnote 3, that court explicitly acknowledges that Roe is not dispositive of the Title IX issue.

So building off of the Plaintiffs' briefing on this issue, in Roe's briefing, even the parties' cases agree that Dodds is not dispositive of Title IX. Ultimately, the statute is dispositive of Title IX.

Finally, Roe's mode of analysis argument doesn't get them there. Dodds only discussed the Title VII principle that sex stereotyping based on a person's gender nonconforming behavior can be impermissible discrimination.

But the Sixth Circuit subsequently explained in Meriwether that Title IX and Title VII are different in important respects, including that Title IX contains Section 1687; and in Bostock, the Supreme Court admonished that the same judicial humility that keeps courts from adding to statutes, keeps them from diminishing them.

So the full analysis of the Sixth Circuit and the Supreme Court -- the mode of analysis -- requires the Court to give effect to the statute itself, which in this case -- and especially includes Section 1686 -- in which Congress explicitly permits what Defendants deny. Plaintiffs not

only have Standing to bring their Title IX Claim, but their claim is meritorious.

Parental Rights. Back to my initial point that Defendants in Roe argue the case they wish it was rather than the case it is.

The blankie they keep coming back to is that our Plaintiffs cannot control the school because it's comfortable to them. No one's going to disagree with that. We don't disagree with that.

Roe's Counsel specifically said that there's a bright line. There is not a bright line. Blau does not allow for a bright line. Blau actually says to the opposite.

At the end of the day -- and those are important threshold points to keep in mind -- to state a Parental Rights Claim, a Plaintiff has to plead that the Government is infringing on their fundamental Parental Rights. That's the claim.

Plaintiffs have stated a claim here if they plead that the Government is interfering with the core of the fundamental right.

Here's the right: Plaintiffs have a fundamental right to direct care, custody, and control of their children and direct the upbringing and education of the children under their control.

That's Troxel, Glucksberg, Meyers, Pierce. Glucksberg makes clear that the Government violation is the Government interference with that fundamental right. And that right is particularly acute with respect to directing religious upbringing of their children.

Counsel -- Counsel -- Plaintiffs' Counsel deeply respects Roe's Counsel in the jousting in the briefing that we've been doing; but on this issue, the Hybrid Rights Theory is a red herring of interjecting this in the issue.

Plaintiffs' Counsel is extremely aware of the Hybrid Rights approach to arguing for heightened scrutiny, but if we were going to argue that, we would have argued that in Free Exercise -- not in Parental Rights.

Our claim is not that there's Hybrid Rights Theory that -- that requires higher scrutiny in Parental Rights. Our claim is that in raising and inculcating the religious upbringing of your children, the interference with the Government in their inability to interfere in that is particularly sensitive; and that is a fair reading of Yoder.

Because Yoder said that Pierce stands as a charter of the rights of parents in the religious upbringing of their children, and so the Court has to pay special close attention to that.

Very consistent with Chief Judge Sutton's opinion in Blau where he made clear that the Plaintiffs -- where the

issue there was whether or not a student and a parent could require their student be able to wear blue jeans. They didn't raise any claims that the practice that was prohibited under the dress code was incompatible with their religious faith, which is -- which is the core -- the gravamen, of a large swath of our entire Complaint which makes sense.

Our Parental Rights Claim is not unmoored, and it's not untethered. It's directly tethered to the right. It's tethered to the core of the right, including its rationale in foundation -- and this is important -- concerning benefits and issues deeply rooted in American history and tradition.

Our claim presents zero issue of limitations, because the interests that are specifically implicated go to the core -- go to the core of the right and are deeply rooted in our nation's history and tradition.

So, for example, I know Counsel -- Defendants' Counsel spent a significant portion of argument arguing for the Fourth Circuit's decision in Grimm -- which is fundamentally wrong on the law -- and the most, the most -- the largest number of judges -- the largest panel to ever consider this issue from a Federal Court in the Adams Court -- which I know we've provided to the Court in our briefing -- came to the exact opposite conclusion; but one

of their observations is really interesting, which is deeply correct -- back to my point -- there's no real dispute here that biologically sex-separated intimate facilities are a long-standing benefit in American history.

The Court there says, there has been a long tradition in this country of separating sexes in some, but not all, circumstances, and public bathrooms are likely the most frequently encountered example.

And then they cited Justice Thurgood Marshall's pithy statement that, a sign that says "Men Only" looks very different on a bathroom door than a courthouse door because the differences in biological sex is a proper distinction that has been recognized in this country since its founding, and a parental desire for their children to have restrooms -- communal restrooms separated by biological sex is tethered to that history and tradition.

To my original point that we're tethered to the core of the right, there is no more core interest in the care and custody of one's children than the right to guard their child in intimate spaces.

And that may be the least ambitious argument ever advanced in the history of American advocacy. Nor is there a more core interest in directing the upbringing of one's children, than shaping the child's core identity in accordance with their religious and moral beliefs and

practices.

Defendants don't wrestle with the Plaintiffs' real claims -- and when I say the Defendants, I mean both sets of Defendants. They argue against the case they wish it was, rather than the one that is before them.

Plaintiffs aren't trying to control the school or coerce the behavior of others. They're just trying to raise their own families, and Plaintiffs have alleged two bases for the right in this case.

I know Counsel -- and we've argued in the briefing -- Roe's Counsel -- about the first bases about they're denying us information needed to choose the school -- choose the best school for the children.

Counsel didn't mention in his particular argument today, but I know that they contest that, so there's no suggestion on our part -- from our part that there's a waiver there.

But the problem is, Counsel in their -- in their Reply Briefing -- in our Response Briefing we raise, this is just -- our claim is tied -- when we're not -- Okay. Let me back up.

Nobody -- and I mean nobody -- in America disagrees that the fundamental Parental Right includes the right of parents to choose the best school for their children. To take themselves -- their children out of public school and

choose the right educational option for the children. Nobody disagrees with that.

But the right itself, the fundamental right -- so we claim there's common sense information about the School's own rules that the parents need to know to properly address that situation for it -- to properly use their judgment to make the best decisions for their children, and the School is not providing it to them.

They argued that we're arguing for a Constitutional -- generalized Constitutional Right to information that we're not arguing.

There's not a generalized Constitutional Right to information, but -- but Constitutional law is not that stilted. It's always applied to the facts that are before the Court at that particular time.

The foundation of the right -- which has not been addressed in Reply or here yet today -- is the ability of the parents and the capacity of the parents to use their considered judgment on behalf of the children.

When the School denies that common sense information about their own rules to the parents, they're interfering with the parents' right to use their considered judgment on behalf of the child.

And we explained common sense ways in the complexities of real life how that actually plays out.

There's always cost/benefit to any decision parents make in raising their kids.

If the public school that they're in is the right decision, or if they need to move to another public school because that local community has different values than the local community that they're in, or -- or they're deciding to homeschool their children, or they send them to private school, which is an option that not everybody can afford.

And in their Response Brief -- or in their Reply Brief, Roe mentions that supposedly that's disingenuous and that we're just trying to argue policy.

In belying that, we argue that the parents can't send their kids -- that the Plaintiffs' essentially don't have the option to homeschool their kids.

But what that misses and forgets is that we even talked about moving other -- to other school districts, and so the real dynamic and the real issue is when you're considering what's in the best interest of your child -- and every parent may be different -- they need to know to what extent is the school interfering in my ability to raise my child, and to what extent is the school raising security concerns that I have, that's my right to guard my child in intimate spaces that I need to consider to decide then balancing do we move -- do we move the kids out of their

neighborhood? Maybe that means they're not on their baseball team anymore or their softball team anymore.

Do we send them to a private school and spend the money for it and get that extra job? Do we homeschool and potentially forgo additional income, which has collateral consequences to the family?

All of those real-life situations that people have to face every day is what goes into considered judgment of what's in the best interest of your child.

So the law -- the core of the right -- the right itself involving the care, custody, and control of your children -- that nobody disagrees -- includes the right to choose the best educational option for your child.

When the Government withholds common sense information that you need to use your considered judgment to act in the best interest of your child, the Government is interfering in your ability to exercise the right; and just -- according to the straight application of the Glucksberg interference language, the Government is interfering in our fundamental right, and we stated a plausible claim for relief.

Now, on the second issue related to the -- the specific direct issues with the care and custody and upbringing of the child, including the religious upbringing and the improper promotion of LGBTQ beliefs and values to

the children, we briefed that pretty extensively and accurately asserted our position on it.

There's a difference -- there is a difference between providing students with information and proper curriculum and affecting young people's hearts and minds outside of proper curriculum.

Our -- and improperly promoting -- and, for lack of a better word, proselytizing children in values and beliefs that are contrary to the parents'. There's a difference between that and providing children information.

Our fundamental allegations fall on the impermissible side of the line, not the permissible side of the line.

And Blau stands for the proposition that parents do not have the right to control schools generally, but school actions are subject to Parental Rights in the rarer circumstances where those fundamental rights are actually implicated, and here the rights are actually implicated.

And I'll finish with this, with just a reminder about why, again, that it's not limitless.

While respecting Counsels' argument that -- related to other precedent from other jurisdictions that are not on facts before the Court here, in a world that it continues to evolve with contentious social issues that people disagree very strongly about, what the Court's task is, is not to

apply what the Ninth Circuit says about Chief Judge Sutton's opinion in Blau.

And the Ninth Circuit is the only circuit that has aggressively stated a proposition like -- that the Meyer-Pierce right ceases at the schoolhouse door.

The Court's -- the Court's obligation is to take the right and apply the right. When you apply the right to this case, as we've claimed, the Plaintiffs have a cause of action, because the interests that are implicated go to the core of the right related to interests that are deeply rooted in our nation's history and tradition.

Equal Protection. Plaintiffs have also stated an Equal Protection Claim. As an initial matter, this is a -- as pled, this is a disparate treatment case. This is not a disparate impact case. This is a disparate treatment case.

As the Sixth Circuit has said, to state an Equal Protection Claim, a Plaintiff must adequately plead that the Government treated the Plaintiff disparately as compared to similarly-situated persons, and that such disparate treatment either burdens a fundamental right, targets a suspected class, or has no rational basis.

Andrews states the -- that's Andrews v. City of Mentor. It's in our briefing, but the citation is 11 F.4th 462. That's at -- pin cite's at 473.

Andrews states the pleading standard, and we pled

against it. Now, the reason that Andrews correctly -- the reason that it explains the law that way, and the reason that it's right is because under the law, unequal treatment is presumptively invidious where the Government interferes with a fundamental right.

Here, we're alleging that the Government is interfering with two fundamental rights -- Free Exercise and Parental Rights -- and Roe's Washington v. Davis argument is misplaced. Andrews accurately states the law for an Equal Protection claim, and we pled against this.

You can see it in play in -- this dynamic in play in multiple Sixth Circuit cases, including Judge White's opinion in Koger v. Mohr, and Judge Cole's opinion in Maye v. Klee. Both of which we provided to the Court in our briefing.

The Koger court specifically rejected the argument that the Plaintiff had to show purposeful discrimination because invidious purpose is presumptively presumed where the Government makes a conscious decision to treat the Plaintiff different, infringing on their religious freedom.

And that brings up the second point I want the Court to keep in -- we'd like the Court to keep in mind from those two cases. In both of those cases -- both in Judge White's opinion and in Judge Cole's opinion -- the

Sixth Circuit found that the Government made a facially discriminatory distinction when it made the conscious decision to treat the Plaintiff worse.

Here, Defendants have made the facially discriminatory -- a facially discriminatory distinction by making the decision to treat Plaintiffs worse than Roe and the families of other transgender students.

And just for reference, that's a -- that is the gravamen of our -- our suit.

So as that is the upshot of what we're claiming, I refer the Court to Paragraphs 61, 71, 87, 98, 92, 122 through 124, 128, and 129 in the Complaint that the Government made the conscious decision to treat the Plaintiffs worse than Roe and the families of other transgender students.

The Muslim families even pled in Paragraphs 71 that they didn't understand why the school valued their beliefs less than the beliefs of the LGBTQ community.

So this case is about disparate treatment, and facial -- facial distinctions by the Government to treat -- to treat Plaintiffs worse than Roe and other transgender students.

So under the mode of the analysis that binds this Court, Plaintiffs' claims are correctly pled, and Defendants' disparate treatment has to survive strict

scrutiny.

The only way this could not have been true, is if Plaintiffs and the families of transgender students weren't similarly situated, and this is an area where Roe has to ignore the benefit aspect of the case.

The Supreme Court has said -- and we provided this quote from Zobel v. Williams, 457 U.S. 55, pin cite page 60 -- when a State distributes benefits unequally, the distinctions it makes are subject to strict scrutiny -- excuse me -- are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

In this case, the Government is distributing benefits unequally. And as a reminder to make this point, communal restrooms are an undisputed educational benefit.

Roe has always had access to communal restrooms, period. The problem for Roe was that Roe claimed the communal restrooms for biological males are not compatible with Roe's asserted identity with who Roe is.

But Plaintiffs also want communal restrooms compatible with their identity -- who they are; and once Defendants stop distributing the benefit based off of immutable characteristic -- biological sex -- and instead began distributing the benefit based on an asserted identity, they can't play favorites, and they can't deny the

same benefit to Plaintiffs without compelling interests narrowly tailored.

And that's true in the larger sense -- that Plaintiffs and Roe are similarly situated, and that they both want communal restrooms -- a benefit that the School's denying to Plaintiffs -- they both want communal restrooms compatible with their asserted identity.

The communal restrooms provided by the School right now are incompatible with Plaintiffs' asserted identity -- their religious identity.

But in this case, there's no pressure on that larger point -- which I'm sure will probably be litigated in American -- will be litigated in the case law in the years to come -- because the School specifically has a law that protects Plaintiffs in their religion and guarantees them equal benefits -- PO 2260 -- just like the benefit they gave to Roe.

Under that policy, as we pled, Defendants also make gender identity and transgender status a protected class.

So in a world where they're no longer making distinctions based on immutable characteristics, the School has a law that says your religious -- you religious Plaintiffs, you get -- we guarantee you equal benefits; and then they're denying them communal restrooms

compatible with their identity while giving that under the auspices of remedying discrimination to Roe based on Roe's identity.

That is quintessentially denying Plaintiffs the Equal Protection of a law -- Policy 2260 -- that protects them.

So when Roe briefs that Plaintiffs invert every basic principle of Equal Protection Law in arguing that they somehow have a right to compel the unequal treatment of others -- besides framing it in a way to try to avoid grappling with the hard issues in this case -- the reality is, the only inversion in this case is the realization that Plaintiffs have civil rights too; and when you apply the -- when you apply -- when you apply the straightforward application of the law, the Government has to survive strict scrutiny.

When it treats Plaintiffs unequally, and that unequal treatment infringes on a fundamental right, if that upsets people's expectations that the law can apply neutrally in a generally applicable way, then maybe it does upset and invert basic principles; but they're not the principles of law. They're the principles of power.

Free Exercise. Plaintiffs pled Free Exercise Claims under both the U.S. and Ohio Constitutions. As explained in the briefing, Ohio did not adopt Employment

Division v. Smith and requires the pre-Smith/Sherbert analysis of burden and sincerity; and then post-Smith, the Federal Claim layers on the question of whether the Government action is both neutral and generally applicable.

But as Judge Thapar explained in Meriwether, even under the Federal Constitution, Government actions that burden religious exercise are presumptively unconstitutional, unless they are both neutral and generally applicable.

The Complaint explains the Plaintiffs' beliefs, and no one can test their sincerity. The disagreement centers around the other elements.

For Ohio, Sherbert burden; and for the U.S. Constitution, Sherbert burden, and whether Defendants are both -- whether Defendants' actions are both neutral and generally applicable.

In our Complaint and briefing, we explain the burden under the law and why the Government's actions are not neutral or generally applicable, which goes back to and arises out of the analysis that begins in our Complaint in the Equal Protection section, and even pre-, -- and even beginning before the causes of action are set forth in the Complaint, and that this case is fundamentally about disparate treatment.

Substantial Burden. We've alleged multiple

substantial -- we've alleged multiple burdens on the Plaintiffs' Free Exercise, and a central failure of Roe's briefing is the inability to grapple with the aspect -- the benefit aspect of the law -- and we see that here too -- including the coercion arising from the Government's unequal distribution of the benefits.

While the sincerity of Plaintiffs' beliefs are not an issue, it's helpful to start there to understand the burden.

It is incompatible with the exercise of Plaintiffs' sincerely held religious beliefs to force their children to share intimate facilities with members of the opposite biological sex.

I'll say that again: Based on their sincerely held religious beliefs, it is incompatible with faithful practice of Plaintiffs' religious beliefs to share intimate facilities with members of the opposite biological sex.

As -- as an aside, let me stop there and mention something that Defendants' Counsel has argued -- argued today and has argued before.

The idea that intimate facilities are not really intimate outside of the stall. That is a revolutionary concept that is contradictory to the expectation that has existed since the founding of the nation and is long rooted in the history and tradition of the nation, that people have

an expectation that their children -- or for themselves -- they have a privacy in intimate spaces.

So, while Counsel is -- we submit that Counsel's free to continue to develop that claim as the case progresses, and the arguing that, that are -- in relation to the sincere religious beliefs of the Plaintiffs, what this -- the Plaintiffs in the Complaint have told the Court is that it is incompatible with the Plaintiffs' sincere religious beliefs to force their children to share communal restrooms with members of the opposite biological sex; and it is not -- it is not the province of the Court to question the sincerity of those beliefs.

And the precision of Counsel's argument that -- of required to set aside the fact -- the point I just stated -- requires development in the record that makes it wholly improper to consider at this stage of the proceedings, including because it's a revolutionary concept in the history of mankind that would surprise everybody, other than those who assert it.

So the burdens that we talked about were both forcing children -- the students -- to share intimate facilities with members of the opposite biological sex, because there's no reasonable alternatives available, in the Hobson's choice mentioned by Judge Thapar in Meriwether of -- the Hobson's choice for them of sharing

intimate communal facilities with members of the opposite biological sex in violation of their religious exercise or forgoing the benefit of communal restrooms. They have a choice. Do you want -- if you want to participate in the community, get on board and use -- set aside your religious views and use the restroom.

As Counsel for the Defendants mentioned subtly from the Grimm opinion, this is an issue that parents care about -- not the kids care about.

And we disagree with that, and we'll get through -- we'll have time to address all of that in time throughout this case; but the reality of it is, is that people don't fundamentally understand and respect the reality of the religious beliefs and the views.

But if you want -- so if you want to participate in the communal benefit, and you want to be part of the community, just get on board and set your religious beliefs at the side; but our country wasn't founded -- and the Constitution prohibits -- prohibits that.

So the coercion that matters under Sherbert is not just direct coercion with a public penalty or criminal prosecution, it's the indirect coercion of being forced to give up your rights or violate cardinal principles of your faith in order to attain a Government benefit.

So -- so they're both directly -- they're both directly burdening the Free Exercise, and they're indirectly burdening the Free Exercise through coercion. Sixth Circuit's had multiple -- and that's Sherbert. Sherbert directly makes that point.

Sixth Circuit's had multiple cases saying that, and we've cited them in our brief. The Dahl case, a policy that forces a person to choose between observing her religious beliefs and receiving a generally available Government benefit burdens her Free Exercise Rights.

And then the Yaacov v. Mohr case, with its citation from Living Word stating that, a burden is substantial where it forces an individual to choose between following the tenets of his religion and retaining Government benefits. That's exactly what we're alleging is happening here.

Before I leave Free Exercise, I want to state -- make one point about the parents' claims themselves. This hasn't been overly-argued and developed in the briefing, but Roe claims that -- and says in this briefing that the Court can't reasonably entertain the parents' own independent Free Exercise interests in raising their children in the faith, because it would create a vicarious Standing problem; and, and because -- well, largely because they say it would create a vicarious Standing problem, but the question of

Standing doesn't ask is it a result that -- is it a result that increases the amount of claims that can be filed?

The question of Standing is whether they have their own interest. They have their own interest -- cognizable interest, because it's their faith. We pled the specific provisions from the both -- from the sacred text of both the Muslim -- for both the Muslims and the Christians about how raising a child in the faith is part of your own faith.

So while Roe claims that it cannot reasonably entertain that the Court would consider the parents' exercise of their own faith, we submit that it cannot be reasonably entertained that it does not, because the only way that the Court can determine that is questioning the sincerity of the Plaintiffs' religious beliefs, which the Court is not supposed to do.

And it's also factually inaccurate. It is part of the Plaintiffs' -- the parent Plaintiffs' religious beliefs to raise their children in the faith.

In the Sixth Circuit Mozert case that Roe cites for this proposition is a case where the parents had Standing. The Court -- it's a case about evolution. Standing for the proposition that parents can't keep schools from giving information to their kids, even if it's offensive information to their kids.

We're not disagreeing with that in this case. Nobody's fighting against that. But in order to reach the issue, the Court had to have Standing to reach the issue. The parents had Standing to assert the claim.

And we do want to point out to the Court, without belaboring Mozert -- because it's not that important -- the Court in Mozart went to extreme pain to emphasize and re-emphasize that all that they were reaching was the issue of whether or not a school -- parents could keep a school in their proper curriculum from exposing children to ideas that the parents disagreed with. Nobody's disagreeing with that here.

Finally, and quickly, and I'll tick through a couple other things real quickly. Neutral and generally applicable. A Free Exercise Claim, even under the -- so what we just described -- substantial burden, coercion, and indirect -- both direct burden and indirect coercion, and the sincere religious beliefs is an Ohio Free Exercise Claim.

So under Ohio Jurisprudence, they have -- because the Sherbert -- Sherbert is triggered, the Plaintiffs -- excuse me -- the Government has to justify and satisfy heightened strict scrutiny for their actions; but under the Federal -- under the Federal standard, the same -- the result is the same, because the Government's actions were

not neutral and generally applicable.

It's important to remember that the Sixth Circuit has made clear that Government actions are not neutral and generally applicable unless they're -- unless there's neutrality between religion and non-religion, and that's Roberts v. Neace.

The Sixth Circuit has also made clear that the Free Exercise Clause protects against even subtle departures from neutrality; and that was Judge -- Judge Thapar makes that point in the Meriwether case, emphasizing that even -- even subtle departures from neutrality.

And with respect to the First Amendment Free Exercise, Judge White and Judge Cole in Koger and Maye, both explain that the Government -- as we mentioned before -- makes a facially discriminatory distinction when it treats the religious Plaintiffs worse than others.

Now, in those two cases, it was -- they both involved Islamic Plaintiffs. One involved -- but it was -- they were inter-religion. So one related to a Muslim practice versus Rastafarian practice, and the other was just within religion, Muslim practice versus another religion; but the difference between religion versus religion and religion versus non-religion is an immaterial distinction.

The Free Exercise Clause requires neutrality between religion and non-religion. That's -- that's Roberts

v. Neace.

So Judge White and Judge Cole's opinions in Koger and Maye are directly applicable, and so is their analysis, and the mode of analysis is binding on this Court.

Fundamentally, Defendants are giving a benefit to transgender students that they're denying the Plaintiffs -- access to a communal restroom compatible with their identity.

In our case, that happens to be a religious identity; and the Government -- so they're saying -- the School is saying that we are choosing to favor Roe's secular gender identity over the Plaintiffs' religious identity, and that's a value judgment that the Constitution does not allow.

And it's not a zero sum game. There's no reason the School could not still provide communal restrooms for -- for the religious families based on -- that are compatible with their gender identity.

Nobody's saying that, further underscoring the false narrative, that this is about coercing Roe and excluding Roe. This is about -- this is, in truth, is about coercing the Plaintiffs. The Plaintiffs have civil rights too.

So the Government is making a distinction that is discriminatory on its face in not distributing benefits

equally and evenhandedly across the board.

Their actions are, therefore, neither neutral nor generally applicable. In the interest of time, I'll just refer to the briefing on our points from Judge Thapar's opinion about the reasons that it's proper.

Both that it's proper for the Court to closely scrutinize what we believe are the marks of -- that Defendants' series of irregularities bear the marks of religious hostility, and why it's -- at the very best for the Plaintiffs on their claims on the Rule -- excuse me -- Defendants on the Rule 12 Motion, it's premature to consider their arguments at this stage of the litigation, because the Government's actions are irregular and bear the marks of religious hostility.

So the Sixth Circuit made clear -- and this is Judge Thapar -- that the Government must give neutral and respectful consideration to a person's sincerely held religious beliefs.

A specific example that's troubling in the Complaint is the disrespect for the Ahiska Muslim Turkish families who gave their own resource, and then were -- to try to create a solution for the problem.

They wanted a benefit of communal restrooms. They wanted to love Roe and any other transgender students the best they could and try to create in a pluralistic society a

world where everyone could coexist in a community; and the School addressed their attempt in about as disrespectful of a manner as you can, by taking the resources and not even telling them they were not only not using them to help provide and meet the need of the Muslim families, but they were using them contrary. To then tell the Muslim families, if you need more privacy for your students, you can use the single-use restroom.

Oh, which, by the way, are discriminatory if Roe uses them; but -- but are an accommodation for the religious Plaintiffs.

No. The religious Plaintiffs seek the same accomodation that Roe received, which is communal intimate facilities compatible with their identity.

The irregularities we mentioned in our brief, I think Roe argues against them some. I don't think Roe does an effective job addressing the reality that the moving target of the Government here is that they're changing their position.

So they said it was Title IX. Then to try to survive the PI, they argued, oh, no, we're enforcing our Antiharassment Policy.

This is Title IX, and we have an Antidiscrimination Policy consistent with Title IX. That was in the July 10th meeting -- in and around that time frame -- and in their

FAQs that came out subsequent.

Then, in trying to survive the Preliminary Injunction, they said, oh, no. Even though there's no language about accommodations at all in our Antiharassment Policy, and even though we've had six opportunities, we're not going to explain to the Court A plus B equals C from that policy how we were doing what we were doing. It was antiharassment.

And now -- now they're adopting wholesale Roe's argument that it's about discrimination. So the Government's position has been all over the board. That's a moving target. That's irregular conduct and a moving target.

They also have not applied their rationale consistently. In the FAQs, they talked about the importance of respecting the dignity of all the -- of all the students.

And you'll notice in our pleading for the -- related to the Christian families and their beliefs, gender identity -- excuse me -- biological sex, that immutable characteristic created and given by God, in their beliefs is -- goes to the fundamental core of their dignity as a human being.

So what the school is saying is, we're going to make sure that all students have communal restroom access in

accordance with their dignity, but they're not applying that rationale in a consistent way. That's irregular.

And then, the -- the mention about the Defendants' supposed investigation into the events of January 12. While it's not in the Complaint, it didn't happen until after the Complaint.

It is part of the record of this case, and what it shows is, it's not -- it's not a witch hunt. It shows that the Government is not treating -- it's consistent with the idea that the Government is not treating these -- all these parties evenhandedly.

It's -- it's -- it has favorites, and it's playing favorites. That's an irregularity. Not fully vetting obvious inconsistencies and conflicts in testimony, and not talking to all the witnesses who were there and were affected by it, that's an inconsistency. It's -- it's a red flag that they're not acting evenhandedly.

And as we've mentioned, all of the foregoing was in addition to the significant irregularity of violating State law to make a major change in secret.

To quote Judge Thapar, courts have an obligation to meticulously scrutinize irregularities to determine where Government action is being used to suppress religious belief; and we respectfully submit that consistent with the irregularities discussed by Judge Thapar in his opinion in

the Meriwether case, similar hallmarks are available -- are present in this case, requiring the same level of careful review and developed record.

Okay. Strict Scrutiny, Student Health and Safety. Backing up. The interest that matters that the Court has to assess and that we have to argue against is the Government's interests.

So as a fundamental matter -- aside from the fact that I think these proceedings are proving that there's really -- that Roe and the Defendants -- Roe and the Board's interests are aligned, there's really no daylight between them; and that their goals are the same, where the Government wholesale accepts the arguments and propositions of a private party. The interests that need to be weighed by the Court are the Government's interests.

So we need to hear the Government explain what they did, why they did it, and then we can assess whether it was narrowly tailored against that interest.

Withholding that from the party is -- while it prevents the ability of the Court to effectively -- when you have claims that trigger strict scrutiny -- assess the Government's actual motive -- or excuse me -- the Government's actual interest, but it also underscores the shifting nature of this dynamic, because -- and you think about the narrowly -- the narrowly tailored analysis.

We put forth several opportunities -- excuse me -- several possibilities for least-restrictive ways of dealing with the issue of making sure everybody's respected; and a lot of the -- Roe's arguments against that center around the idea of discrimination.

It doesn't solve the discrimination problem that Roe doesn't get to go into the restroom -- does not have the restroom consistent with Roe's identity.

But all of our issues directly relate to -- all of our alternatives specifically address the issue of harassment, and that's what the Board -- that's what the School said when it tried to get around the P -- before the Court with the PI.

So by not having the School provide its interest, having Roe argue it for the School as a tag team, the School essentially gets to avoid the actual vetting and analytical rigor against their actions the Constitution demands in protecting people's civil rights and individual liberty.

And then I will just, finally, direct the Court back to our briefing, because it's self-explanatory, but I do want to make the point.

Compelling -- if -- first, health and safety. I still don't understand specifically what Roe is arguing with health and safety, nor what the Defendants will be adopting, because they don't actually explain it.

But discrimination. You cannot have a compelling interest when what the Government's actions do creates the problem that they say they're trying to solve.

So in giving Roe the benefit they say they're giving Roe and other transgender students, they're just -- by not giving it to the religious -- the religious Plaintiffs, and saying, you either set aside your religious beliefs -- if you want to use the communal restrooms, set aside your religious beliefs, they're creating more discrimination than they're solving. Under -- under Constitutional law, that is not a compelling interest.

So -- and instead of choosing, as we mentioned, more narrowly tailored options, they chose broad discrimination against the religious Plaintiffs.

I also have -- I'll represent to the Court -- that the safety issues -- same principle. They're creating safety issues that -- that -- with their goal of promoting student safety.

And I'll represent to the Court, in the PI hearing, what was provided to the Court as the public record of the School's incident report is the public record from the institution. It's not signed, and I have other copies that I followed up with Miami County this weekend, and on Friday just to confirm -- to get the public record, and they

said that they're not signed by the officer, because they're submitted electronically.

So what the Court has in the PI hearing is the public record; and in that, the student -- the School Resource Officer specifically recommends that the School have adults in the restrooms at all times.

To our knowledge, tautologically, the School hasn't had adults before that point in the restrooms; and to our knowledge, the School has never had adults in the restrooms; but the recommendation from the Student Resource Officer is now that we need -- now we need adults in the restrooms.

Ergo, you're creating collateral safety risks and issues that didn't exist before. All the more reason you need to have the Government actually explain their position.

Finally, the PPRA. Our briefing explains this well, and the parties' briefing on this issue is like two ships passing in the night.

We are not claiming that the PPRA creates a private right of action. Rather, 1983 is the cause of action.

If the Court reads Blessing v. Freestone, which is the 1997 Supreme Court case, and goes through the steps in that analysis regarding the PPRA, we believe that the Court comes to the conclusion that the PPRA confers individual Federal rights.

And if a Federal statute confers individual Federal rights, then Gonzaga -- the case from 2002 -- says the rights are presumptively enforceable through Section 1983.

And as identified in our briefing -- in our last brief, the PPRA conveys multiple individual rights, and so, therefore, 1983 let's the Plaintiffs bring a claim to enforce the individual rights.

Counsel makes a big deal about Lexmark, but that was a Lanham Act case about the scope of the cause of action in the Lanham Act. Ship passing in the night. Has nothing to do with what our actual claim is.

Same with the Ashby case Counsel mentions in Counsel's Reply Brief. We didn't discuss Ashby, because we had already briefed it, and it's only applicable here in that it specifically acknowledges the independent operation of 1983.

So when you do the Blessing analysis and then apply Gonzaga, the PPRA does confer individual rights and serves as a basis for 1983.

Finally, because the Court asked us to and my time is running short, or out, I want to address the issue of the sequence of the PI in the Motions to Dismiss.

I'll frame -- Defendants' Counsel didn't argue this, but I think that Counsel for Roe made a cogent

argument, but I'll call it -- it's a prudential argument.

The issue for what the Court does and how the Court sequences its decisions is ultimately not about prudence as much as it is about power; and I would say any prudential considerations or practical considerations of deciding them after the Motion to Dismiss are trumped by the time of the Plaintiffs submitting their Preliminary Injunction way before the Rule 12 Motions were filed, and the Plaintiffs' attempts to try to get that issue resolved now over a period of time.

The power concerns are just this, and this, I believe, is the correct analysis for the Court. The Court -- the minute that Complaint was filed, the Court had jurisdiction over every claim in the Complaint to the extent that the Court had original jurisdiction over one of the Federal questions.

The only way that the Court did not have original jurisdiction over at least one of the Federal questions is if the Court -- if the Plaintiffs lacked Standing on all of the Federal Claims.

Pointing out a really -- pointing out something worth observing, in their 12(b)(1) Motions here, they don't even claim to dismiss the third cause of action on the grounds of Standing, which is the Parental Rights Claim.

So as a matter of basic logical, the Court already has the power properly to decide any of the issues before it whether or not any of the Federal Claims would be subsequently dismissed.

The Court previously, on its own initiative, asked the Court -- asked the parties to brief the Standing issue for the Court to decide for itself if the parties had Standing on any of their Federal Claims.

And our -- and we submit to the Court, that if the Court -- if the Court satisfies itself that the parties have Standing on any of the their Federal Claims, then it is proper for the Court to resolve the Preliminary Injunction issue separate from the Motion to Dismiss, because Motions to Dismiss are not -- merits arguments are not jurisdictional.

And the Plaintiffs have -- have -- the Plaintiffs have patiently waited for the Preliminary Injunction decision, and we have -- which we filed months and months ago, and have been respectful to let Roe intervene under the -- under the auspices that it wouldn't slow down the Preliminary Injunction, and we're talking about more delay, and giving Counsel for the Defendants all the time Counsel needed to brief and argue against it.

So we submit on the question of power, it's proper for the Court, if it satisfies itself on Standing for one

claim, to decide the Preliminary Injunction issue separate from the Motion to Dismiss, within the Court's discretion; and we respectfully submit that prudentially, as a matter of practicality, we believe the equities weigh in favor of resolving -- of resolving the Preliminary Injunction Motion if the Court so desires. Thank you, sir.

THE COURT: Thank you, Mr. Ashbrook. I assume we're taking another ten-minute recess at this time?

MR. CAREY: Well, Your Honor, that depends on the Court's schedule. By my count, Plaintiffs took approximately 12 minutes longer than the Defendants collectively took. We would like to take that time for rebuttal. If the Court has time for a ten-minute break before we do so, then we would appreciate that.

THE COURT: When would that -- when would that make us finish up, if we do?

MR. CAREY: Well, if we were to proceed now, it would be 12 minutes from now. Alternatively, it would 22 minutes, so a little bit after --

THE COURT: I'm going to take a very, very short break. Just a -- just a minute or two.

MR. CAREY: Sure. Thank you, Your Honor.

THE COURT: We'll recess quickly.

COURTROOM DEPUTY MS. McDOWELL: This Court is now in recess.

(Court was in recess at 12:12 p.m. and resumed at 12:17 p.m.)

THE COURT: Please be seated. We're back in session. We tried to make our recess as quick as we could. Happy to hear from -- happy to hear from Counsel.

MR. CAREY: Your Honor, once, again, David Carey of the ACLU of Ohio on behalf of Intervenor Anne Roe.

Much of what has been said is covered in our briefing, and recognizing that I am the only thing standing between this Court and lunch --

THE COURT: Oh, no, no, no.

MR. CAREY: -- I'm going to be brief.

THE COURT: No, we're all good.

MR. CAREY: The Plaintiffs have already presented a moving target on Standing with regard to Title IX, but at times it seems from their rhetoric that they're going beyond simply devising new legal theories.

They're going so far as to misstate or try to alter the claim that they've pled and the relief that they've asked for. And here is what they asked for in the Complaint:

I'm looking at Paragraph 108. Quote, the Plaintiffs want a Declaratory Judgment that Title IX does not require Bethel to implement an intimate facility policy based on gender identity. The Board has maintained that it

must have intimate facilities separated by gender identity and not biological sex because of Title IX.

The Plaintiffs seek a declaration. The law does not require this, and that it is permissible for the Board to have biologically sex-segregated intimate facilities.

I'll give them this much, that's direct, and it's unambiguous. That is the relief they asked for. That is the nature of their claim.

They seek a declaration from this Court that their preferred restroom arrangement would be permissible under Title IX, if the School ever chose to adopt it.

They never asked for a finding that anyone's Title IX rights have been violated -- either a subset of the Plaintiffs, or all of them.

It's unclear whether they're actually trying to move those goalposts now; but if they are, what they're describing would be a new cause of action, but they've not asked to amend the Complaint.

And we submit, in fact, that adding a novel cause of action at this stage -- even if they did so by amending the Complaint -- or rather, by seeking to amend the Complaint after numerous briefs on Title IX Standing, after argument today, would be unduly prejudicial; and here I'm looking at Koukios versus Ganson, 229 F.3d 1152, Sixth Circuit 2000; but it would also be futile.

The theory that the Plaintiffs are trying to articulate -- which appears to be cannibalized from their Equal Protection Claim -- still does not describe discrimination on the basis of sex.

To the extent that they're describing a disagreement about Title IX, it's about interpretation of the word sex, not differential treatment on the basis of sex, no matter how that term sex is interpreted.

Moving forward to the Parenting Claim. The Plaintiffs have argued that Blau didn't raise a religious claim, but it does draw a bright line, and it cites cases that do involve religious claims, as we've mentioned before and in our briefing.

The Court in Blau cited to cases including Littlefield, which is a Fifth Circuit case; Leebaert, which is a Second Circuit case; and Swanson out of the Tenth Circuit, all of which involved religious values as part of a Parenting Rights Claim, and none of which found any parental right to direct the school's action.

In Swanson, it also expressly rejected the Hybrid Rights Theory on top of rejecting a heightened level of scrutiny merely from the involvement of religious values. Again, that is just simply a misstatement of what Blau stands for.

The Plaintiffs have also argued that their Parental

Rights have been burdened, or elsewhere they've described it rhetorically as interference by the School.

In particular, they've argued that by not providing answers to the Plaintiffs' interrogatories, essentially, the School District is burdening the Plaintiffs' Parental Rights.

There is a clear and obvious difference between impermissibly burdening a right, or penalizing it, as opposed to simply not actively facilitating it.

As we've noted in briefing, Plaintiffs also have Free Speech Rights. The School may not violate their Free Speech Rights, but the School also doesn't have to furnish them with a megaphone.

By the same token, they have a right to send their children to public school or not. The School cannot prevent them from doing so or penalize their choice to do so, but it is not under a Constitutional obligation to handhold them through the decision process -- including answering whatever questions they may personally deem important.

If that were the law, there would be no limiting principle to it. Public schools would be overrun with parental demands of all sorts.

And it's worth highlighting, again, that the Plaintiffs' particular questions are a good illustration of how that situation would be untenable.

I'm looking at Paragraph 97 of the Complaint. These don't appear to be mere requests for information. They ask about hypothetical situations. They demand information about policy interpretations, and how they might be applied in those hypothetical scenarios. Some of them are heavily leading or argumentative.

What they're claiming here is not requests for information. What they're claiming is a right to cross-examine school officials at will. Parenting Rights cannot be weaponized in this way.

The Espinoza case that has been cited in briefing -- Espinoza versus Montana Department of Revenue -- is another case that is relevant here as a contrast, both with regard to Parenting Rights and Free Exercise.

Supreme Court in that case wrote about how religious exercise was being burdened because it was being comparatively penalized. Students who went to a religious private school would have to forfeit benefits to do so as compared to students who went to secular private school.

Nothing like that sort of penalty exists here, either in absolute or comparative terms. No benefits are being withheld from religious students. Everyone is offered the exact same restroom access.

With regard to Equal Protection, with their disparate treatment argument, the Plaintiffs are still

attempting to equate two groups -- themselves and transgender students -- who are not similarly situated.

In part because equality and inequality are not symmetrical. When one group asks to be treated equally and a second group asks for the first group to be denied that access, those are not comparable requests or equivalent benefits, no matter how Plaintiffs may couch it rhetorically.

The Court in Jones -- again, that District of Colorado case -- got this right. Courts look at how the parties are actually being treated, not whether they got what they wanted or what they asked for.

But even if the Courts did look at Equal Protection from that angle, these two groups are not similarly situated. One is not being treated preferentially. Both have access to the same restrooms. They're both being treated equally under the restroom arrangement, and what the Plaintiffs are seeking from the school is fundamentally not the same category of thing as what Anne Roe sought.

Turning to Free Exercise. The Plaintiffs are asking this Court to broaden the concept of substantial burden or coercion well beyond precedent; and, frankly, well beyond the reality of public schools.

For Plaintiffs merely to encounter an environment where others do not adhere to their religious beliefs cannot

be coercion.

So contrast this with Yaacov versus Mohr, which is a Sixth Circuit case they cited in their briefing and mentioned again today.

The Plaintiff in Yaacov was incarcerated, and he requested a vegetarian meal because it was Kosher. The Sixth Circuit held that he had stated a claim. He was asking only that the food that he personally ate conform with his religion.

His claim would have failed if he had tried to compel the prison kitchen to serve only Kosher food. Even if his religion had mandated strict vegetarianism, and even if he had argued that eating meat was transgressing the fundamental core of his faith such that to be near it, to see it served, to have to smell it was abhorrent to him, he still would not be able to compel all others in the cafeteria to eat only vegetarian meals in the name of his own religion. That might well be his preference, but he would not be coerced or burdened by not being granted that authority.

With regard to compelling interests and strict scrutiny, the Plaintiffs have mentioned -- I'm sorry -- in the context of religious animus, the Plaintiffs mentioned an SRO report, which they claim is in the public record. We've addressed this general subject before in the Preliminary

Injunction hearing, but I'd reiterate that nothing in that alleged incident or report says anything at all about religious discrimination.

If rules were being broken in this school -- which, again, I reiterate that they were not -- at least not by Anne Roe -- that is a separate issue from students' treatment on the base of their -- basis of their religion, or for that matter, on the basis of their sex. So even if that SRO report was in the public record -- which we do not concede -- it would be irrelevant.

I stand on my briefing from there with one final point: Across all of their Constitutional claims, the Plaintiffs -- no matter what terminology they're trying to couch it in -- are arguing that their rights are a means to compel others to conform to their preferences.

We've explained why that's wrong in the law no matter how they frame it in terms of identity or coercion or burdens, but more than that, it also can't be the law.

Plaintiffs are -- are fond of observing -- and I'm paraphrasing here -- that we live in a diverse, multicultural society, that necessitates a degree of tolerance of others, and I'm not just talking about as interpersonal value, but as an essential component simply for public institutions to function.

Parents -- as I've observed before, parents have

the right to be free of Government intrusion into their parenting; but public schools could not function if parents could all impose contradictory demands on curricula or on operations on the basis of their religion or for any other reason.

Students have a right to practice their faiths, but public schools also could not function -- many public institutions could not function if each student had the right to demand that the entire environment around them and everyone in it be consistent with their religion.

Again, that would be just impossible to navigate in light of all the contradictory demands. That is part of why that line is so clearly demarcated in the law. Breaching it here would create an unworkable state of affairs, and the damage would by no means be limited to restrooms. Thank you.

THE COURT: Thank you, Counselor.

MS. DINKLER: If I may have --

THE COURT: Ms. Dinkler, yes.

MS. DINKLER: May it please the Court, the School moved for dismissal on all claims on Standing. The Board of Education at the Preliminary Injunction Hearing stated that the United States Supreme Court has not addressed this particular issue, which remains true. Does not state that Circuit Courts and District Courts haven't addressed the

issue, because they have, as the briefing shows.

Plaintiffs argued religious hostility. It is not in the Complaint. It is disproven by the Complaint. Three groups of Plaintiffs -- two groups religious, one not -- all in the Complaint state they are treated the same. It undercuts the discrimination claim as a matter of their allegations and law.

The Board has not changed its argument. All arguments with regard to the accommodation granted here started under Title IX as the Complaint admits and as attached to the -- the initial pleadings; and the Title IX is enforced through the Board's Antidiscrimination Policy, which notes it at the bottom, which is attached to the Answer, as well as all of the protections afforded for religious purposes to students and families.

The Board has not failed to make arguments here by adopting briefing to afford -- to avoid repetition, and the Plaintiffs have consented to it by adopting their briefing in response to the Board. We are not at Rule 56. We are at Rule 12.

The Complaint -- the Board has no obligation to bring -- to bring forth a record. The record is the Plaintiffs' Complaint, which has been challenged as a matter of law.

An SRO cannot set policy, custom, or practice for a

Board of Education as a matter of law. Just like a police officer out on the street here in the City of Dayton cannot set practice for any private or public institution.

What we heard here, as expected, is that history tells us. History tells us. Judge Floyd addressed that. History changes. We make advancements. Science changes, and it makes advancements; and there is no greater benefit than people tolerating one another with neutrality, which is exactly what the Board of Education did in making its accommodation for Anne Roe. Thank you.

THE COURT: I thank Counsel for both sides for making -- all three sides for making very detailed, very zealous arguments this morning. The Court will take them under submission. We do stand in recess. Thank you.

COURTROOM DEPUTY MS. McDOWELL: All rise. This Court is now in recess.

(The hearing was concluded at 12:32 p.m.)

CERTIFICATE OF REPORTER

I, Julie Hohenstein, Federal Official Realtime Court Reporter, in and for the United States District Court for the Southern District of Ohio, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

s/*Julie Hohenstein* May 16, 2023

JULIE HOHENSTEIN, RPR, CRR, RMR
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